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No. 73-1313

In the Supreme Court of the United States

OCTOBER TERM, 1973

INTERNATIONAL TELEPHONE AND TELEGRAPH CORPORATION, COMMUNICATIONS EQUIPMENT AND SYSTEMS DIVISION, PETITIONER

v.

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Following a hearing conducted pursuant to Section 10(k) of the National Labor Relations Act, 29 U.S.C. 160(k), the Board issued a decision awarding certain disputed work to the employees of petitioner Company represented by the Communications Workers of America rather than to those represented by respondent Local 134 (Pet. App. C, 1c-17c). When Local 134 refused to abide by the Board's award and continued to exert economic pressure on the Company for the work, an unfair labor practice complaint issued against Local 134 and the Board, after further hearing, found that Local 134 had violated Section 8(b)(4)(D) of the Act, 29 U.S.C. 158(b)(4)(D). The Board ordered Local 134 to cease its unlawful conduct (Pet. App. B, 1b-24b).

The court of appeals held that the Board's findings and conclusions were supported by the record (Pet. App. A, 4a-6a). However, it declined to enforce the Board's order on the ground that, since "the hearing officer in the §10(k) proceeding subsequently served in a prosecutorial capacity as counsel for the General Counsel at the §8 Unfair Labor Practice Hearing," the Board's procedure violated Section 554 of the Administrative Procedure Act, 5 U.S.C. 554 (Pet. App. A, 6a).[1] The court based its conclusion on the premises that "[i]t is apparently admitted that §554 applies to §10(k) hearings" (Pet. App. A, 8a), and that "the §10(k) hearing officer in this case is the equivalent of a hearing examiner for purposes of §556" (*id.* at 8a, n. 3).[2]

2. The basic question presented by the petition is whether a proceeding to resolve a jurisdictional dispute under Section 10(k) of the National Labor

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[1]Section 554, which applies "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing," provides, in relevant part, that:

> (d) * * * An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review * * * , except as a witness or counsel in public proceedings. * * *

[2]Section 556(b) of the Administrative Procedure Act provides, in relevant part, that, in hearings required to be conducted in accordance with Section 554, "[t]here shall preside at the taking of evidence * * * one or more hearing examiners appointed under section 3105, of this title." Section 3105, in turn, provides that hearing examiners "may not perform duties inconsistent with their duties and responsibilities as hearing examiners."

Relations Act is an "adjudication" within the meaning of the Administrative Procedure Act, so that the provisions of the latter Act respecting adjudications are applicable to Section 10(k) proceedings. The Board believes that the court of appeals erred in answering that question affirmatively.[3] Moreover, its decision on that question conflicts with that of the District of Columbia Circuit in *Bricklayers, Masons and Plasterers Int'l Union* v. *National Labor Relations Board*, 475 F. 2d 1316, 1318-1321. The Board did not file a petition for a writ of certiorari in the present case, however, because it concluded that it presented the issue of the

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[3]A Section 10(k) proceeding is not an "adjudication" within the meaning of the Administrative Procedure Act because it is not a "final disposition * * * of an agency" (5 U.S.C. 551(6)). See *National Labor Relations Board* v. *Plasterers' Union*, 404 U.S. 116, 126-127; *Marine Cooks and Stewards (Irwin-Lyons Lumber Co.)*, 83 NLRB 341. Moreover, the court of appeals misconceived the role of a hearing officer in a Section 10(k) proceeding:

> The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of pertinent facts as may be necessary for a determination of the issues by the Board. * * * At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute. [29 C.F.R. 101.34; Pet.App. F, 2f.]

applicability of the Administrative Procedure Act in a factual setting which was not likely to recur.[4]

Respectfully submitted.

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General Counsel,
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[4]It is not general practice to use the same person who hears the Section 10(k) case to investigate and prosecute the subsequent Section 8(b)(4)(D) case. See *Int'l Longshoremen's and Warehousemen's Union (General Ore, Inc.)*, 124 NLRB 626, 628-629.

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